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In the Supreme Court of the United States

OCTOBER TERM, 1975

LOUIS J. POMPONIO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

CHARLES PILUSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. Apps. 1a–7a) is reported at 511 F. 2d 953. The oral order of the district court granting petitioner Pomponio's motion for arrest of judgment (Pomponio Pet. App. 9a–10a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1975. The court of appeals denied rehearing on March 4, 1975. Petitioner Pomponio filed his petition for a writ of certiorari on April 3, 1975. On March 20, 1975, the Chief Justice extended petitioner Piluso's time for filing a petition for a writ of certiorari until May 3, 1975, and the petition was filed on May 2, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of 18 U.S.C. 215 and New York Penal Law § 180 (1975) are set forth at Pomponio Pet. 3–5.

QUESTIONS PRESENTED

1. Whether petitioners' indictment under 18 U.S.C. 1952 (the Travel Act) was invalidly based on violations of Section 180 of the New York Penal Law (concerning commercial bribery) and 18 U.S.C. 215 (concerning payments to bank officials for aid in securing loans).

2. Whether, as to petitioner Piluso, the trial court erroneously instructed the jury that it could rely on conduct violating either statute in finding "bribery" within the meaning of the Travel Act.

3. Whether petitioner Piluso was prejudiced by the trial court's inaccurate description of the conspiracy charged during an otherwise proper instruction.

STATEMENT

Petitioners were indicted in the Eastern District of Virginia for conspiracy and substantive offenses involving interstate travel to promote the unlawful activity of bribery, in violation of 18 U.S.C. 1952, and 371 (Pomponio Pet. App. 10a–15a; Piluso Pet. App. 10a–14a).[1] Prior to trial petitioners moved to dismiss the indictment, claiming that the unlawful bribery activities they were accused of traveling to promote—violations of 18 U.S.C. 215 and Section 180 of the New York Penal Law—did not constitute the "unlawful activity" of "bribery" under the Travel Act, 18 U.S.C. 1952 (Piluso Pet. App. 15a). The district court denied the motion.

After the court severed the case against petitioner Pomponio because of his health problems, the trial of petitioner Piluso and his co-defendants proceeded and a jury convicted petitioner Piluso on one count of conspiracy to violate, and two counts of violation, of the Travel Act. He was sentenced to concurrent terms of two years' imprisonment.

Petitioner Pomponio was convicted by a jury on the same charges. He moved for arrest of judgment pursuant to Rule 34, Fed. R. Crim. P., reiterating his challenge to the indictment on the ground that the Travel Act did not cover the unlawful activity charged. The district court granted the motion (Pom-

[1] Also indicted were Peter and Paul Pomponio, whom the jury acquitted.

tors. Petitioners paid Zneimer $320,000. (Tr. 282–283, 293, 373–374, 494–496.)

ARGUMENT

1. Petitioners contend that the indictment did not charge a violation of the Travel Act, because acts in violation of the state law (N.Y. Penal L. § 180 (1975)) and the federal law (18 U.S.C. 215) referred to in the indictment did not constitute the "unlawful activity" of bribery within the meaning of the Act.[2] The decision of the court of appeals rejecting these claims does not conflict with the decision of other courts of appeals[3] and properly construes the Travel Act.

The indictment charged in essence that petitioners conspired to and did travel between Virginia and New York with the intent to make payments to the officer of a national banking association to influence him in the performance of his duties without the consent of the bank, and that they thereafter made such payments, thereby engaging in the unlawful activity of bribery in violation of N.Y. Penal L. § 180

[2] Petitioner Piluso makes the same challenge to his conviction, but since he does not dispute the sufficiency of the evidence to support the allegations of the indictment, we address the issues in the context of the indictment.

[3] Petitioners assert (Pomponio Pet. 9–10; Piluso Pet. 16–22) a conflict with *United States* v. *Niedelman*, 356 F. Supp. 979, 980–982 (S.D. N.Y.), holding in conflict with other decisions in the same district, that a Travel Act charge cannot be based on N.Y. Penal L. § 180. But a conflict between decisions of a court of appeals and of a district court does not require resolution by this Court. The conflict among judges in the Southern District of New York is for the Second Circuit to resolve. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

ponio Pet. App. 9a–10a), and the government appealed.

The court of appeals, having consolidated the appeals, reversed and remanded in petitioner Pomponio's case and affirmed petitioner Piluso's conviction, holding that violations of Section 180 of the New York Penal Law and 18 U.S.C. 215 constitute the unlawful activity of bribery under the Travel Act (Pet. Apps. 1a–7a).

The evidence is not in dispute and may be briefly summarized. As part of his job as senior vice-president of the Royal National Bank in New York City, in charge of real estate construction and financing loans, Sidney Zneimer processed requests for periodic advances or draws against construction loans. Bank inspectors would verify that the progress in construction work was as represented in the individual's draw request so that the bank's loan would be secured by work in place. (Tr. 280–287.)

Petitioners were in the business of constructing high-rise buildings. In 1967, on their own initiative, they paid Zneimer for securing for them a loan to pay off a second mortgage owed to the Royal National Bank. Thereafter, one of the petitioners travelled to New York City and gave Zneimer a check each time he approved a construction loan for one of their corporations.

Over a five-year period, Zneimer helped petitioners receive eleven construction loans from Royal National Bank, totalling $16 million. This included over-advances of approximately $3 million, most of which were given without the approval of the bank's inspec-

and 18 U.S.C. 215. The New York law proscribes the misdemeanor of "commercial bribing," consisting of the conferring of a benefit on an employee to influence his conduct in relation to his employer's affairs, without the latter's consent. N.Y. Penal L. § 180. The federal law makes it a misdemeanor for an officer of any bank whose deposits are insured by the Federal Deposit Insurance Corporation to receive or agree to receive anything of value from any person for endeavoring to procure a loan from the bank. 18 U.S.C. 215.

a. Petitioners argue (Pomponio Pet. 16, 20; Piluso Pet. 14–19) that violations of neither the state law nor the federal law can be a basis for violation of the Travel Act, which is a felony, because they are both misdemeanors. The Travel Act makes it a crime to travel interstate to promote "any unlawful activity" (18 U.S.C. 1952(a)(3)), which is defined as including, *inter alia*, "extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States." 18 U.S.C. 1952(b)(2).[4]

There is nothing in this language that limits it to unlawful activity that is a felony. On the contrary, it broadly prohibits certain offenses that are "in violation of the laws of" a state or the United States. Conduct that a state or the United States has made a misdemeanor is conduct "in violation of" its laws.

The courts of appeals have rejected petitioners'

[4] Under Section 1952(b)(1), "unlawful activity" also includes any business enterprise involving gambling, non-tax-paid liquor, narcotics or controlled substances, or prostitution offenses in violation of state or federal law, without regard to their status as felonies or misdemeanors.

narrower reading of the Travel Act and applied the statute to travel to promote crimes that are misdemeanors. See, *e.g.*, *United States* v. *Brennan*, 394 F. 2d 151, 153 (C.A. 2); *United States* v. *Karigiannis*, 430 F. 2d 148, 150 (C.A. 7), certiorari denied, 400 U.S. 904. Indeed, the state law violations underlying the Travel Act violation this Court upheld in *Erlenbaugh* v. *United States*, 409 U.S. 239, included misdemeanors.[5]

The characterization of bribery and other "unlawful activities" referred to in the Travel Act may vary among the states at any given time,[6] and may not always remain what it was when the Act was enacted in 1961. There is no indication that Congress incor-

[5] For example, under Ind. Ann. Stat. § 10-2307 (1956) (see 409 U.S. at 242), the maximum penalty was a $100 fine and three months' imprisonment.

This Court's pre-*Erlenbaugh* decision in *Rewis* v. *United States*, 401 U.S. 808, is not to the contrary. In stating that Congress did not intend that "the geographic origin of [a gambler's] customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies" (*id.* at 812), the Court was addressing the role of the interstate travel, not the classification of the state offense. (In fact, violation of the state statute underlying the indictment in *Rewis* (Fla. Stat. Ann. § 849.09 (1975)) was punishable by imprisonment for from one to five years in the circumstances alleged in that case.) Indeed, the statement apparently recognized that, if the travel requisites of the Act were met, it would reach travel to promote "relatively minor state offenses."

[6] For example, bribery of public officers was a misdemeanor at common law (Clark & Marshall, *Crimes* § 14.02, at 1032 (7th ed. 1967)) and is not a felony in all states (*e.g.*, R. I. Gen. L. Ann. § 11-7-3 (1956)), and "commercial bribery" is a felony in some states, *E.g.*, Tex. Codes Ann. § 32.43 (1974); Colo. Rev. Stat. § 40-5-401 (1963).

porated *sub silentio* such an adventitious limitation into the Travel Act.

b. Petitioners contend that violation of neither N.Y. Penal L. § 180 nor 18 U.S.C. 215 constitutes "bribery" within the meaning of the Travel Act. With respect to the state law, petitioners contend (Pomponio Pet. 11–15; Piluso Pet. 19–22) that the Travel Act is implicitly limited to bribery of public officers, as at common law, and does not encompass "commercial bribery" of purely private employees. But while the primary impetus for this provision of the Travel Act may have been bribery of public officials (cf. *United States* v. *Nardello*, 393 U.S. 286, 292, n. 9), the Act is not limited to bribery of public officials nor to bribery as defined at common law.

As petitioners acknowledge (Pomponio Pet. 12, n. 7; Piluso Pet. 20), when the Travel Act was enacted the bribery statutes in many states were not confined to public officials and often covered commercial bribery. In view of Congress' purpose in the Travel Act of curtailing multi-state criminal enterprises, the legislature did not intend to ignore the broadened scope that the state bribery statutes had come to have. The essence of the offense of bribery is the unauthorized exchange of money for action the recipient is empowered to take (Clark & Marshall, *Crimes* § 14.02 (7th ed. 1967); 3 *Wharton's Criminal Law and Procedure* § 1386 (Anderson ed. 1957); the public or private character of the action is secondary.

c. Petitioners make a similarly technical challenge to the indictment's reference to 18 U.S.C. 215, claiming that it proscribes "graft," not "bribery," and penalizes only the recipient, not the briber (Pomponio Pet. 17–19; Piluso Pet. 10–14). This Court made clear in *Nardello*, however, in holding that acts prohibited by a "blackmail" statute constituted "extortion" for the purpose of the Travel Act (393 U.S. at 293–295), that the applicability of the Act is governed by the essential nature of the underlying offense, not its particular title or characterization.

Like other bribery statutes, Section 215 is directed at, and seeks to prohibit, the unauthorized exchange of action for money. That it directly penalizes only the recipient instead of both parties (cf. 18 U.S.C. 201) makes it no less a "bribery" statute, particularly in view of the potential liability of the giver of the bribe as an aider and abetter, 18 U.S.C. 2.[7]

2. Petitioner Piluso contends (Pet. 23–25)[8] that if this Court were to hold that only either the New York law or Section 215 can be relied upon to establish the unlawful activity of bribery under the Travel Act, but

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[7] Petitioners' reliance (Pomponio Pet. 17; Piluso Pet. 12) on *Rozete* v. *United States*, 199 F. 2d 44 (C.A. 6), certiorari denied, 344 U.S. 904, is misplaced. There, in holding specific criminal intent unnecessary under 22 U.S.C. 1584 (prohibiting the giving of something to, or its acceptance by, a government employee in connection with procurement of goods or services), the court discussed in *dicta* certain general distinctions between "graft" and "bribery," but noted that the latter included "receiving * * * anything of value with the intent to influence the recipient's actions * * *." *Id.* at 48.

[8] Petitioner Pomponio, who has not yet been sentenced nor appealed his conviction, cannot and does not make this claim at this juncture.

not both, his conviction cannot stand because the jury may have based it upon travel to promote bribery in violation of the inapplicable statute. Cf. *Stromberg* v. *California*, 283 U.S. 359, 368; *Leary* v. *United States*, 395 U.S. 6, 31–32.

If the Court were to agree with our submission that the Travel Act covers the crimes prohibited in both statutes, there would be no occasion to consider this issue. In any event, Piluso did not object to the charge on this ground, did not attempt to require the government to elect one of the statutory references, and did not seek appropriate forms of special questions to the jury. Unlike *Stromberg* and *Leary*, the same evidence here showed schemes to promote violations of both statutes.[9]

3. Petitioner Piluso also contends (Pet. 25–27) that a single inaccuracy in the trial court's description of the scope of the conspiracy constituted reversible error.[10] However, in its instructions, covering 50 pages of trial transcript (Tr. 1201–1251), the district court accurately explained several times the nature and scope of the Travel Act charges and the conspiracy charge (Tr. 1206, 1207, 1228–1229, 1240). Viewing the charge as a whole (*Cupp* v. *Naughten*, 414 U.S.

[9] In both *Stromberg* and *Leary* there was a strong possibility that the jury convicted on the basis of facts that did not establish an offense.

[10] At one point in the court's extensive charge, after having explained several times the scope of the substantive and conspiracy charges, the court erroneously stated "that the conspiracy is to violate these two federal laws, 1952 and 215" (Tr. 1208; Piluso Pet. App. 27a).

141, 146–147) and the unchallenged sufficiency of the evidence, the isolated, fleeting misstatement did not constitute reversible error. See *United States* v. *Gary*, 447 F. 2d 907–911 (C.A. 9).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petitions for writs of certiorari should be denied.

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